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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

CONRAD H. SCHELLONG,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Charles W. Nixon
29 S. LaSalle St.
Suite 330
Chicago, Ill. 60603
(312) 782-7450

Attorney for
Petitioner

QUESTIONS PRESENTED

1. WHETHER PETITIONER'S DENATURALIZATION CAN STAND WHERE THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT FAILED TO PROPERLY APPLY THE CLEAR AND CONVINCING STANDARD OF PROOF, IGNORED THE COMMON LANGUAGE USAGE OF THE TIME AND PLACE IN ISSUE AND WHERE THE GOVERNMENT FAILED TO PROVE ITS CASE?

2. WHETHER THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT ERRED BY EMPLOYING THE DISJUNCTIVE CHAUNT TESTS OF MATERIALITY WHERE THERE WERE INSUFFICIENT FACTS ESTABLISHED TO DISQUALIFY PETITIONER FROM CITIZENSHIP?

3. WHETHER PETITIONER WAS DENIED A FAIR TRIAL DUE TO SUBSTANTIAL IMPEDIMENTS TO ADEQUATE DISCOVERY AND USE OF VIDEOTAPE DEPOSITIONS AT TRIAL WITHOUT CROSS-EXAMINATION?

4. WHETHER PETITIONER WAS DENIED HIS RIGHT TO TRIAL BY JURY?

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OPINIONS BELOW

The decision of the United States District Court stripping Petitioner of his United States Citizenship was entered on September 9, 1982. A copy of that decision is attached hereto as Appendix A. The decision of the United States Court of Appeals for the Seventh Circuit affirming was entered on August 24, 1983. A copy of that decisions is attached hereto as Appendix B. A petition for rehearing was timely filed and was denied on September 22, 1983. A copy of the order denying the petition for rehearing is attached hereto as Appendix C.

JURISDICTION

This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution of the United States:

Article III, sec. 2
... The Trial of all Crimes ... shall be by Jury; ...

Amendment V
No person shall...be deprived of life, liberty or property without due process of law...

Amendment VI
In all criminal prosecutions, the accused shall enjoy...an impartial jury...

Amendment VII
In Suits of Common Law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved...

Statutes:

Immigration and Nationality Act
8 USC §1447:

Final hearing--Open court; examination under oath

(a) Every final hearing upon a petition for naturalization shall be had in open court before a judge or judges thereof, and every final order which may be made upon such petition shall be under the hand of the court and entered in full upon a record kept for that purpose, and upon such final hearing of such petition the petitioner

and the witnesses, except as provided in subsection (b) of this section, shall be examined under oath before the court and in the presence of the court...

Immigration and Nationality Act §304(a)

8 U.S.C. §1451(a)

(a) Concealment of material evidence; refusal to testify. It shall be the duty of the United States Attorneys for the respective districts, upon affidavit showing good cause therefor, to institute proceedings in any court specified in subsection (a) of section 310 of this Title [8 USCS 1421(a)] in the judicial district in which the naturalized citizen may reside at the time of bringing suit, for the purpose of revoking and setting aside the order admitting such person to citizenship and canceling the certificate of naturalization on the ground that such order and certificate of naturalization were illegally procured or were procured by concealment of a material fact or by willful misrepresentation, and such revocation and setting aside of the order admitting such person to citizenship and such canceling of certificate of naturalization shall be effective as of the original date of the order and certificate... .

PROLOGUE

The period of Adolph Hitler's control of Germany is one of the darkest chapters in modern history. The Nazi Party's rise to power and its use of that power stand in sharp contrast to the Spirit of America. The barbarism of the Nazi government in modern times can compare only with the revolutionary period in Russia, the darkest days of the Stalin regime and the "cultural" revolution in Communist China--if it can be compared at all.

Americans feel a strong sense of revulsion when faced with the words--Nazi, SS, Concentration Camp. These, indeed, are words associated with your Petitioner, Conrad Schellong. Mr. Schellong joined the Nazi Party in 1932 and remained until 1945. He was a member of the SS in 1932 through 1945. He was associated with German Concentration Camps from 1934 through 1939. Almost

all of us have wondered why and how a person could have ever become associated with such things. We ask how could it happen. How could Germany--the home of Schiller and Goethe--the homeland of many Americans--? We search for answers; we find no answers.

But America has another question in need of answer. Can we be fair in spite of our feelings, our biases and our fears? Or do we turn our backs and dispense with impartiality and fairness when we believe someone has been associated with a group we feel is unworthy of decent treatment? The answer to this question may answer more questions than we would, at first, suspect. It was Hitler's government that dispensed with impartiality and fairness to people Hitler felt were unworthy of decent treatment.

Our law requires an unbiased, impartial review and this Court may undertake that review to independently determine the foundations of the findings under the doctrine set forth in Schneiderman v. United States, 320 U.S. 118 (1943).

STATEMENT OF THE CASE

The United States of America filed civil action 81 C 1478 in the United States District Court for the Northern District of Illinois against the Petitioner, CONRAD SCHELLONG. The Complaint was brought under Title 8 U.S.C. para 1451(a) and in four counts alleged that Petitioner had either illegally procured, or procured by concealment of a material fact or by willful misrepresentation his Naturalized United States Citizenship. The Plaintiff sought for relief the revoking and setting aside of the July 17, 1962 order of the United States District Court for the Northern

District of Illinois admitting Defendant to United States Citizenship and canceling Certificate of Naturalization No. 8465738. Petitioner made demand for trial by jury which was stricken on the Court's own motion. The matter proceeded to a bench trial before Honorable Bernard M. Decker. On September 8, 1982 judgment was entered setting aside the order of July 17, 1962 admitting Conrad Schellong to citizenship and canceling his Certificate of Naturalization (Appendix A).

Appeal was taken to the United States Court of Appeals for the Seventh Circuit. The judgment was affirmed (Appendix B). On September 22, 1983 petition for rehearing was denied. (Appendix C)

STATEMENT OF THE FACTS

Petitioner joined an armed unit of the Nazi SS in Dresden in 1934 (Tr.383). This unit was part of the German Army (Schellong Ex.5,p.3). Some months later this unit was transferred to Sachsenburg Concentration Camp (Tr.429). In 1936 he was transferred to Dachau Concentration Camp and remained attached to that regiment until shortly after September 1, 1939, the beginning of World War II (Tr.431,440). He then served in several combat units until the surrender of Germany. The allegations in the Complaint concern Petitioner's service in the SS during the years 1934-1939 and his disclosure or lack thereof in 1956 on his visa application and in 1962 on his Citizenship Application and a supplemental affidavit.

No one has accused Petitioner of any atrocities or of directly harming another (Tr.245,532). The thrust of

all allegations relates to being assigned as a troop or guard or willful false statement. At these camps there were several staffs. Each of these staffs performed different functions. One staff was the Commandant's. These men ran the prison compound and the daily lives of the prisoners. They took care of and were responsible for food, housing, work and punishment of the prisoners. (Tr.252). Among the other staffs were the troops or guards. The members of this group lived in military barracks outside of the prisoners area, engaged in military training and performed the security function--stood guard outside the camp and escorted prisoners to and from work sites outside of the camp. (Tr.165). The troops or guards merely stood there (Sch.Ex.1,p.3). The troops or guards were forbidden to either talk to or touch a prisoner (Tr.166,245). There is not so

much as an allegation that Petitioner struck a prisoner. It should be kept in mind that Petitioner was a member of this external troop or guard staff in 1934-1939, never the Commandant's staff. In these years the prisoners' food was good and there was no systematic extermination (Tr.247,R102,p.181). Petitioner acted in an external guard capacity only at Sachsenburg and only on 36 occasions over a seven-month period in 1936 (G.Ex.36). To use the words in an affidavit the prosecutor provided uttered by a former prisoner, Monsignor Schelling:

Q "Were these guards especially brutal?

A. "They simply carried out their duty. The simply stood there and guarded. He said the people who gave them trouble were the internal people; Block Leaders, the Work Commando Leaders. The guard units were not permitted to be cruel to the prisoners, they were only supposed to stand there and guard." (Def.Ex.1, p.3 not addmited in evidence).

In 1946 a former Dachau prisoner, Mr. Gattinger, testified at the War Crimes Tribunal where almost all of the Commandant's staff were sentenced to death (R.94,p.47). The troops or guards were not war criminals under the Nuremburg Tribunal's mandate.

It is the fact Petitioner was a member of the troops or guards that the Government claims Petitioner willfully misrepresented or sought to conceal that allegedly renders his Naturalized United States Citizenship voidable. Petitioner denies making any willful misrepresentation and Petitioner claims these allegations are not material under the first prong of the Chaunt test (United States v. Chaunt, 364 U.S. 350, 1960). Petitioner concedes, however, that under the literal wording of the second prong of the Chaunt test they may be material since the discovery that Petitioner was a member of a troop

or guard unit at a concentration camp "might have been useful in an investigation possibly leading to discovery of other facts warranting denial of citizenship." The question of the meaning of the second prong of the Chaunt test was carefully discussed in the concurring and dissenting opinions in United States v. Fedorenko, 449 U.S. 490 (1981) but without a resolution.

The Petitioner denies he made any willful misrepresentations or concealment. The Government claims concealment was allegedly accomplished by false statements in his visa application in 1956 and in his naturalization papers in 1962:

Visa Application:

1. Failure of Petitioner to list his residence addresses in 1934-1939 on the visa application.

2. Using the term "German Waffen SS" in 1934-1939 as place of residence on his visa application.

Naturalization Papers:

3. Failure to list the individual units of the SS to which he belonged in 1934-1939. Petitioner did disclose on the application his membership in the Nazi Party, Allgemeine SS and Waffen SS.

4. Stating the Waffen SS was part of the German Army; and

5. Stating: "I had never to do any service in an concentration camp..."

POINTS 1. and 2. are explained and the explanation more or less accepted by the Seventh Circuit:

> If this case centered only around the visa application, we would be reluctant to uphold a finding of willful concealment or misrepresentation. The testimony of government witness L. Donald Junior, a former consular official, indicates that the visa application itself was very limited in space; the application's answer would be expanded on the supplemental questionnaire which was also required and in the face-to-face interview. Yet no supplemental questionnaire was introduced into evidence in this case, and this Court can only hypothesize as to whether or not Schellong was asked about his Waffen SS service, as the government claims he must have been, and whether or not he clarified or expanded his answer. For all we know at this point, Schellong might have entered "Waffen SS" as a form of shorthand for his residences, fully intending to clarify the answer if

given the opportunity to do so. App.B, p.7.

The critical issues found against the Petitioner are points 3, 4 and 5 above.

POINT 3--Failure to list the individual units of the SS to which he belonged. If Petitioner was a liar, he surprizingly did list Nazi Party, Allgemeine SS and Waffen SS. The Government's claim of false statement has two alleged bases: 1. There was no Waffen SS in 1934-1939; 2. Even if there was a Waffen SS in 1934-1939, he should have listed the individual units of the SS, as he did, in part, in a 1936 curriculum vitae (G.Ex.D-3) prepared for the SS. But the armed SS was called the Waffen SS in 1934-1939 popularly to discriminate it from the general or Allegemeine SS. "Waffen" means armed. Mr. Schellong so testified. That is the usage in a 1940 document prepared by the Waffen SS (G.Ex.D-21) and several years later by the

Waffen SS in another document (Def.Ex.No.4). Both of the documents were produced by the Government from official German documents captured in about 1945 and vouch for the Petitioner's language as the common usage. If the subdivisions were wanted, the Petitioner's declaring the name of the organization facilitates any further questioning concerning the subdivisions or units. No adverse inference arises due to the 1936 curriculum vitae. The Seventh Circuit used the 1936 curriculum vitae to infer there was no Waffen SS in 1936 (G.Ex.D-3) by stating:

> "In addition, even if the term 'Waffen SS' were used informally during that period--a finding the district court rejected--the evidence shows that on a 1936 curriculum vitae prepared by defendant himself, he listed his organizational affiliations by individual name rather than collectively as Waffen SS." (App.B, p.8)

But a look at another document, G.Ex.D-28, forecloses that inference. G.Ex.D-28 is a curriculum vitae of Major Schellong

(Schellong was promoted to major in November, 1942 (Def. Ex.2, p.2). It is agreed that at that time the "Waffen SS" term had been in use for years. This curriculum vitae does not use the term "Waffen SS' either. Nor does it list the organizations the Seventh Circuit implied should have been listed. Both curricula vitae list the unit he joined and the present assignment at the time of writing. No adverse inference exists from these documents taken in context.

POINT 4.--In 1962 Naturalization Supplemental Affidavit by stating the Waffen SS was part of the German Army. Petitioner testified that the Waffen SS was under the High Command of the German Armed Forces. The Government's expert testified it never was a part of the army but was under the High Command of the German Armed Forces in battle. At

the time Petitioner joined the armed SS his official governmental service record, recorded at about that time, states he joined the army (Reichsheer) (Def.Ex.5,p.3). "Reichsheer" means army of the realm.

"Waffen" means weapons or arms. Common usage in the German language is:

"Waffendienst"--military service.

"Waffengattung"--branch or arm of the service.

The New Cassell's German Dictionary, Funk & Wagnalls, New York, 1958, p.550.

The Merriam-Webster Dictionary, Pocket Edition published August, 1974 states: "army . . . 1: a body of men organized for war 2 often cap: the complete military organization of a country for land warfare." Petitioner's service record contains the recommendation for the awarding of the German Cross in Gold (Def.Ex.2) and award of the Knight's Cross of the Iron Cross (Def.Ex.3) both

for combat service on the Russian Front. These show that Petitioner's service was in part of "the complete military organization of a country for land warfare."

POINT 5--"I had never to do any service in an Concentration Camp."

> "The evidence showed that he was a trainer and supervisor of concentration camp guards. Defendant argues that he never participated in supervising or punishing the camp prisoners; that he was not part of the camp commandant's staff, which was responsible for the daily routine of the prisoners' lives, but was only part of the external guard; that in fact he never 'entered' a concentration camp. The government agrees there is no evidence that defendant himself punished any prisoners, though he did check on a prisoner held in solitary confinement at Sachsenburg at least once. The government also agrees that defendant was not part of the commandant's staff, and that he was responsible for prisoners only in that he was to prevent their escape, both from the camp and from outside work sites to which they were escorted. But defendant is playing a semantics game in arguing that he never served 'in' a concentration camp but merely served 'at' Sachsenburg and Dachau. Clearly, the district court did not believe that Schellong was capable of making such

> a fine distinction in 1962. Even if such a distinction were plausible, it would be exceedingly difficult to make in the case of Sachsenburg, which was a fenceless camp, consisting of one large building housing both prisoners and guards in separate sections." App.B, pp.8 and 9.

But Petitioner never said he never set foot in such a camp in connection with his visa or naturalization applications. The issue is not whether a finder of fact believes Petitioner ever was "in" a camp. The test avoids facing the real issue. Whether Petitioner made a knowingly false statement when he wrote: "I had never to do any service in an Concentration Camp."

The Commandant's Staff were tried at Nuremburg and almost all sentenced to death (R94,p.47). The ones that cause trouble were the "internal" ones, the guards simply stood there (Def.Ex.1,p.3). The distinction between Commandant's Staff and the troops or guards is very substantial.

On July 20, 1939 near the end of the Petitioner's service in any way connected with concentration camps, his direct commanding officer prepared a complete evaluation of the Petitioner and his qualifications (G.Ex. No.D-19). This officer, without any motive to falsify and using language as it was used by the troops or guards in 1939 found Petitioner not qualified to be an officer in a concentration camp--after Petitioner's five years of service as a trainer of recruits at the concentration camps. This is weighty evidence of contemporaneous use of language made at a time without motive to falsify. The prosecutor put it best:

> "Q (By Prosecutor Lynch) Counsel brought our attention to the fact that 'Officer in a Concentration Camp' was not underlined indicating you weren't qualified to be an officer in a Concentration Camp. I would suggest that 'Officer in a Concentration Camp' in the German, 'Fuhrer in Kozentrationslager' applied

only to the Kommandant's staff inside the concentration camp?

"A (By Mr. Schellong) I think so."

As the Germans used terms in 1939 the Petitioner's 1962 statement, "I had never to do any service in an Concentration Camp," means I never served on the Commandant's staff.

Petitioner employed language in answering questions on his visa and naturalization papers as it was used in Germany in 1934-1945 by the Waffen SS, the guard units and the prisoners.

I.
THE GOVERNMENT FAILED TO PROVE ANY FALSE STATEMENTS OR WILLFUL MISREPRESENTATIONS

The Government brought this civil action in order to strip the Petitioner of United States Naturalized Citizenship. Petitioner's application and other papers concerning his visa and naturalization were subjected to a test of strict historical accuracy based upon a subsequent review of historical records and the beliefs of a youthful and aggressive historian.

Petitioner had not seen his Waffen SS records before the filing of the complaint in this case. Petitioner had not seen the historical documents from Germany, such as proclamations and secret documents now in evidence. Petitioner joined the armed SS in 1934 as a private.

The Government set up Petitioner's visa and naturalization statements against an attempt at a strict historial view in the 1980s, rather than Petitioner's under-

standing as a common man who had lived through those experiences--his answers accurately express the usage of the people who lived through those times.

In essence three criticisms were made by the Government of Petitioner's use of language:

1. Using the term "Waffen SS" to describe his service in 1934-1939.

2. Saying the Waffen SS was part of the army.

3. Saying "I had never to do any service in an Concentration Camp."

1. The Waffen SS - 1934, 1939.

The SS was divided into two main groups: a.) The Allgemeine SS or General SS, and b.) the Waffen SS or armed SS. The General SS worked at their civilian jobs, lived in their homes, did not bear arms and wore uniforms at public functions to show support for the party. The armed SS worked

at military posts, lived in barracks, bore arms and wore uniforms at all times. In 1934 Petitioner joined a military unit, he was issued uniforms, took basic military training, lived in barracks, and bore arms. Both Petitioner and his wife testified that his units in the armed SS were referred to in the 1930s as Waffen SS--"Waffen" meaning "armed." After the official name came into use in 1939 or 1940 the official government records used and recognized the common usage. For example, there are two official Waffen SS documents in evidence that display this usage: a. Schellong Ex 4 prepared in 1942 promoting Petitioner from captain to major states about Petitioner: "Duty posts held after appointment as Waffen SS officer: 1937-1938 Company Commander 1938-1939 battalion adjutant..." (Note the Government mistranslated this document omitting the critical word

"Waffen.") In 1942 the Waffen SS employed the same usage as Petitioner: It referred to Petitioner's duty in 1937-1938 and 1939 as service in the Waffen SS. A 1940 evaluation of Petitioner by his commanding officer, Gov't Ex #D-21, uses the same vocabulary as Petitioner when he stated that Petitioner joined the Waffen SS on 5 February 1934. Petitioner's usage in 1956 and in 1962 of the same language constitutes a true statement!

2. The Waffen SS was part of the army. When Petitioner joined the Waffen SS in 1934 the official records of that organization state Petitioner joined the army ("Reichsheer") (Schellong Ex #5,p3). The O.S.I. did not translate that exhibit. The ordinary American English meaning of the word "army" according to The Merriam-Webster Dictionary, Pocket Book edition published August, 1974 is: "ar.my ... 1: a body of men

organized for war 2 often cap: the complete military organization of a country for land warfare..." The Government historian concedes that the military training Petitioner received was superior to the regular army. Petitioner was a drill instructor, platoon leader, company, battalion and brigade commander who was decorated for bravery in land battle. According to both the captured official German record showing Petitioner joined the army and ordinary English usage and Petitioner's actual service - Petitioner was in the army.

3. Petitioner did not serve in a concentration camp. Most of the time between 1934-1939 Petitioner was assigned to Sachsenburg Concentration Camp and Dachau Concentration Camp. The United States Court of Appeals for the Seventh Circuit has characterized the facts Petitioner asserts in defense of this

as--"playing a semantics game..."

The Merriam Webster Dictionary, Pocket Book edition published August, 1974 defines the word "semantics"--"1: the study of meanings in language 2: connotative meaning." After the opinion (App B) calls it a game in the study of meanings it then creates a novel issue in the case: It equates ever being in a concentration camp with service in a concentration camp. Then it rests its opinion on this sleight of hand.

Petitioner's statement on his naturalization papers was: "I had never to do any service in an Concentration Camp..." Since Petitioner was assigned to the troops outside the camp, the question involved is: What is service in a Concentration Camp? If what Petitioner did was service in a concentration camp, he told an untruth. If what Petitioner did was not service in a concentration camp, he told the truth.

At trial Petitioner testified he was never in Dachau Concentration Camp and he was never in Sachsenburg Concentration Camp. If this be true he did not serve in the camps. This is the question upon which the Seventh Circuit ruled against Petitioner. But from the language of the Opinion itself, there is room for a lingering doubt.

> "... Clearly, the district court did not believe that Schellong was capable of making such a fine distinction in 1962. Even if such a distinction were plausible, it would be exceedingly difficult to make in the case of Sachsenburg, which was a fenceless camp, consisting of one large building housing both prisoners and guards in separate sections." App. B, p.9.

The Opinion bases itself upon the trial court's belief that Petitioner could not make a "fine distinction" in 1962 and that if the distinction were plausible it would be exceedingly difficult to make. To take an American's Citizenship away because he can make a distinction is nonsense. In addition, the issue is

Petitioner's service, not an argument whether he was in a camp at one time or the other.

There is no "fine distinction" between the troops and the Commandant's Staff--it's a glaring distinction. After World War II the Commandant's Staff were almost all sentenced to death as war criminals. The troops were not even charged. That's a distinction!

Former prisoners in those camps made the distinction between the troops or guards and the internal people. Monsignor Schelling's statement taken by the chief government counsel in this case and translated by the translator regularly employed by his office stated:

Q Mr. Lynch: "Were these guards especially brutal?

A Monsignor Schelling: "They simply carried out their duty. They simply stood there

> and guarded. He said the people who gave them trouble were the internal people..."

(Schellong Ex 1, p.3, not in evidence)

Monsignor Schelling distinguishes Petitioner's group from those who performed internal service.

The Waffen SS in July 1939 made the exact same distinction. Just at the end of Petitioner's service in any way connected with any concentration camp his commanding officer prepared a complete evaluation of Petitioner's years of service (Gov't Ex D-19). The chief trial counsel for the Government and Petitioner expressed it best:

> "Q (By Mr. Lynch) Counsel brought our attention to the fact that 'officer in a Concentration Camp' was not underlined indicating you weren't qualified to be an officer in the concentration camp. I would suggest that 'Officer in a Concentration Camp' in the German, 'Fuhrer in Kozentrationslager' applied only to the Kommandant's staff inside the concentration camp.
>
> " (By Mr. Schellong) I think so."

An officer who served in a concentration camp was a member of the Commandant's staff--it was not an officer of the troops or guards such as Petitioner.

The prisoners, the Commandant's staff and the troops all made the exact same distinction in 1939 as your Petitioner made in 1962. Petitioner's service was not in a concentration camp. The statement allegedly false is true!

The opinion below is in direct conflict with decision after decision of this Court and the circuits.

The question asked your Petitioner that brought forth the written statement "I had never to do any service in an Concentration Camp" is unknown. The witness who asked the question cannot recall the question. Chief Justice Burger's opinion in a perjury case for the unanimous court in Bronston v. United States, 409 U.S. 352 (1973)

is instructive:

> "Under the pressures and tensions of interrogations, it is not uncommon for the most earnest witnesses to give answers that are not entirely responsive. Sometimes the witness does not understand the question, or may in an excess of caution or apprehension read too much or too little into it. . . . It is the responsibility of a lawyer to probe; testimonial interrogation, and cross-examination in particular, is a probing, prying, pressing form of inquiry. If a witness evades, it is the lawyer's responsibility to recognize the evasion and to bring the witness back to the mark, flush out the whole truth with the tools of adversary examination."

The conviction for perjury of an arguably evasive witness was reversed. The Second Circuit was faced with a definitely false statement in United States v. Profaci, 274 F.2d 289 (1960). Profaci answered no he had not been arrested to his naturalization examiners. He had been arrested, convicted and sentenced to one year in prison in Italy before he came to the United States. But the context of that question was not known and

there was a possibility of misunderstanding. In delivering its opinion of outright reversal of denaturalization it held:

> "Fraudulent intent and knowledge, absent a voluntary confession, is not often easily established. Knauer v. United States, 328 U.S. 654, 66 S.Ct. 1304, 90 L.Ed 1500. Nevertheless, the law is not devoid of persuasive methods of probing the actual state of a man's mind. Cf. Smith v. California, 80 S.Ct. 215. And such a probe must establish strong inferences of falsification if citizenship is to be revoked. Nowak v. United States, supra; Baumgartner v. United States, 322 U.S. 665, 64 S.Ct. 1240, 88 L.Ed. 1525. Often it is possible to infer an intent to falsify and deceive from the mere untruthful response to a question, the clarity of which leaves little or no room for a reasonable explanation of misunderstanding. But, when a question is not reasonably free from ambiguity, a clear understanding thereof and an intent to deceive are not to be readily implied merely from a false answer. Such, we think, is the case here."

Here we do not know what question was asked. We do have answers that are true or, at least, Petitioner's understanding, the understanding of the German government, prisoners at the camps and the units

of those camps.

The Supreme Court of the United States set out the method of review in Schneiderman v. United States, 320 U.S. 118 (1943). The evidence in a denaturalization case must be weighed according to three principles:

First: All inferences from the evidence must be drawn as far as reasonably possible in favor of the citizen. (320 U.S. at 122, 158-59).

Second: With all the inferences drawn favorably to the accused, the Government must prove each element of its case by "clear, unequivocal and convincing" evidence. (320 U.S. at 135).

Third: So viewed, the evidence must "not leave the issue in doubt" on any element of the case. (320 U.S. at 135).

In accord: Chaunt v. United States, 364 U.S. 350, 353 (1960); Baumgartner v. United States, 322 U.S. 665, 670 (1944); Fedorenko v. United States, 449 U.S. 490, 505 (1981).

Your review of this case is essential to assure the prevention of a miscarriage of justice - to save an American Citizen from the "hydraulic pressure" that Justice Holmes counseled us to avoid.

II.

THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT ERRED BY EMPLOYING THE DISJUNCTIVE CHAUNT TESTS OF MATERIALITY WHERE THERE WERE INSUFFICIENT FACTS ESTABLISHED TO DISQUALIFY PETITIONER FROM CITIZENSHIP.

This section assumes arguendo, that there was a misrepresentation or concealment of fact. The Seventh Circuit held:

> "But there were sufficient facts introduced into evidence to show that if the visa examiner or the naturalization examiners had been aware of defendant's role at Sachsenburg as a trainer and supervisor of guards, and as a rotating Security Officer on Reserve; and of his role at Dachau as a trainer of troops held on reserve for guard duty; and as a member of the SS Death's Head Units, they would have either denied his visa application and naturalization petition (Tr.43,65, 94), Fedorenko v. United States, 449 U.S. at 514-516, or continued then pending a more detailed in-

> vestigation (Tr.67), 'possibly leading to the discovery of other facts warranting denial of citizenship.' Chaunt v. United States, 364 U.S. 350, 355; United States v. Fedorenko, 597 F.2d 946, 951 (5th Cir.1979), affirmed without affirming or denying this particular aspect of materiality, 449 U.S. at 518 n.40."

See: App B

The ruling is in the disjunctive--"either denied his visa application and naturalization petition...or continued then (sic) pending a more detailed investigation." The Seventh Circuit's opinion rests on either prong of the Chaunt test.

The question is whether these misrepresentation and concealments constitute "concealments of material facts" or "willful misrepresentation" within the meaning of Section 340(a).

Guidance in making this determination is provided by the Supreme Court decisions in Chaunt v. United States, 364 U.S. 350 (1960) and Fedorenko v. United States, 449 U.S. 490 (1981).

In Chaunt the United States petitioned under section 340(a) to revoke and set aside the order admitting petitioner Chaunt to citizenship on the ground that the order had been obtained by concealment of a material fact or by willful misrepresentation in his petition for naturalization and in his examination under oath. The district court cancelled petitioner's naturalization finding that he had concealed and misrepresented three arrests, his membership in the Communist Party and his lack of allegiance to the United States. The Court of Appeals affirmed, reaching only the question of concealing the arrests.

The Supreme Court emphasized, as it has done many times before and since, that in view of the grave consequences to the citizen, "naturalization decrees are not lightly to be set aside--the evidence must indeed be 'clear, un-

equivocal, and convincing' and not leave 'the issue ... in doubt.'" 364 U.S. at 353. The Court, reversing the judgment of the court of appeals, formulated a rule which narrows considerably the kinds of concealments and misrepresentations which will provide a basis for denaturalization:

> Suppressed or concealed facts, if known, might in and of themselves justify denial of citizenship. Or disclosure of the true facts might have led to the discovery of other facts which would justify denial of citizenship.

364 U.S. at 352, 353.

It is clear from the two part Chaunt rule that not all false statements or concealments made during the naturalization process will form a basis for revocation of citizenship, even when the person seeking citizenship made the false statements or concealments under oath. The dissent in Chaunt emphasized this point, noting, "it is

nowhere suggested, for example, that the petitioner's falsehoods were the result of inadvertence of forgetfulness - that they were anything but deliberate lies." (at 356). This approach reflects the extreme care which the Supreme Court exercises when dealing with revocation of citizenship.

In Fedorenko, the government sought to revoke Fedorenko's citizenship both on grounds of illegal procurement and on grounds of concealment and misrepresentation. The ultimate ruling was based upon the Displaced Persons Act. That act excluded individuals who had "assisted the enemy in persecuting civilians" or who had "voluntarily assisted the enemy forces...in their operations." Petitioner here was a regular quota applicant. The Displaced Persons Act prohibitions do not apply.

The district court, applying the

Chaunt rule, held that although disclosure of Fedorenko's service as a Treblinka guard would have prompted an investigation into his activities, the government had failed to prove that such an inquiry would have uncovered any additional facts warranting denial of a visa. The court of appeals reversed, disagreeing with the district court's interpretation of the second part of the Chaunt rule. The court of appeals held that the second Chaunt test requires only clear and convincing proof that (a) disclosure of the true facts would have led to an investigation and (b) the investigation might have uncovered other facts warranting denial of citizenship.

The Supreme Court affirmed the court of appeals but on different grounds. It found that petitioner gave false

information in connection with his application for a visa under the Displaced Persons Act. The Court added, "This does not, however, end our inquiry, because we agree with the Government that this provision only applies to willful misrepresentations about 'material' facts. The first issue we must examine then, is whether petitioner's false statements about his activities during the war, particularly the concealment of his Treblinka service, were 'material.'" 449 U.S. at 507, 508.

The Court held that "[a]t the very least, a misrepresentation must be considered material if disclosure of the true facts would have made the applicant ineligible for a visa." 449 U.S. at 509. The Court then held that the true facts about petitioner's service as an armed guard at Treblinka death camp would, as a matter of law, have made him ineligible

for a visa under the Displaced Persons Act. Thus his certificate of citizenship was revocable as "illegally procured" under § 340(a).

The concurring and two dissenting opinions in Fedorenko analyze in some detail the second Chaunt test of materiality.

Justice Blackmun concluded that there is in reality only one Chaunt test, that the so-called second test is simply another method of stating what the government must establish, namely the existence of facts which would disqualify a person from citizenship.

Justice White would give independent effect to the second Chaunt test. If the government proves by clear, unequivocal and convincing evidence that an investigation would have occurred if a truthful response had been given and that the investigation

might have uncovered facts justifying denial of citizenship, the defendant could rebut the government's showing by establishing that the underlying facts would not have justified denial of citizenship.

Justice Stevens concluded that the second Chaunt test required that the government establish by the requisite quantum of evidence that a truthful answer would have led to an investigation and that disqualifying circumstances actually existed.

It is necessary to apply these various tests to Petitioner's assumed misrepresentations and concealments to determine whether they were "material" within the meaning of Section 340(a). We need be mindful of Justice Stevens' cautionary observation in Fedorenko, that "[t]he gruesome facts recited in this record create what Justice Holmes described

as a sort of 'hydraulic pressure' that tends to distort our judgement." 449 U.S. at 538.

First, the Petitioner has denied participating in any individual acts of oppression and there is no evidence that he so much as struck a prisoner. The Government never made such a claim (Tr.245,532). Historical perspective is important. Petitioner served at the camps from 1934-1939--before the war. These camps were never death camps (Tr.247); in 1934-1939 the food was good (R102,p.181). This state of facts is substantially removed from the 1945 newsreels of stark horror. In addition, contrary to the misstatement in both lower court opinions, Petitioner did not join any group to be a guard at a concentration camp--the unit he joined was stationed in Dresden (Tr.428,9;383); his unit was transferred to Sachsenburg

without his choice (Tr.429).

Petitioner's major pre-war function was soldierly training or leading such training (Tr.239). His sole function in relation to the prisoners at the concentration camps was to prevent escapes (T.165). A separate staff, the Commandant, had sole responsibility for the details of the prisoners' daily lives --food, quarters, work and punishment (Tr.252).

The Government's employee-witnesses testified that the Petitioner was not eligible based upon misleading and erroneous hypothetical questions. Each question assumed false statements and assumed facts not in evidence. In addition, none of those called by the Government knew of the several staffs or their separate functions at the camps; that neither of the camps was a death camp (Tr.96,161-3,247); nor any of the

now known facts displayed in the record of the trial. The Government failed to produce any regulations, rulings or memoranda of the I.N.S. that bear on the question of disqualification. The only reason given for ineligibility was moral turpitude or lack of good moral character (Tr.65,94). It was not indicated whether their opinion rested on alleged lies or alleged duties or a combination of both or of their misunderstanding of the pre-war camps from post-1945 newsreels.

Is there clear and convincing evidence that the conduct of Petitioner constituted moral turpitude? The short and unpopular answer is no!

Petitioner joined a military organization of his then country. He obeyed his orders. He did not desert. He did not mutiny. He acted as an external guard on 36 occasions to prevent escapes of prisoners who had been lawfully im-

prisoned under Nazi Law--President Hindenburg had lawfully abrogated civil rights under the German Constitution in effect at the time (Tr.112). Petitioner did not strike or otherwise injure the prisoners. The words "Nazi" and "Concentration Camp" invoke an intense emotional response in almost everyone. The strength of these emotional responses makes it extremely difficult to objectively weigh the moral character of a person who is in any way associated. At the time these unfortunate events occurred Germany was in a state of emergency--world depression; the fear of communism; hyperinflation. (Tr.107,109). In extreme emergency governments, even free and honorable governments, takes steps that in retrospect are regretted. We would rather not have put more than 100,000 U.S. citizens and aliens of Japanese ancestry in camps in 1942.

In all fairness those American soldiers who stood guard at those camps were not guilty of moral turpitude nor of bad moral character.

If we boast of freedom in America, which we should, it is necessary to judge a man by his own individual acts--not judge him by the acts of associates or by acts associated with a place that occurred years after he left that place.

The Petitioner was, in 1956, eligible for a visa, and he was, in 1962, eligible for United States Citizenship.

The Supreme Court should determine the applicability of the second prong of the test in Chaunt. Petitioner cannot and does not maintain that knowledge by counselor or naturalization officials would not have led to an investigation. The question is whether the second test is a totally independent basis for denaturalization, or that there is in

reality only one Chaunt test, that the so-called second test is simply another way of saying the existence of facts must be established to prove disqualification for citizenship. Or, whether it has independent effect and shifts the burden of proof.

The Office of Special Investigations, based on passage of P.L. 95-549 in 1978--Immigration and Nationality Act-Nazi Germany, is filing dozens and dozens of suits to denaturalize and deport American Citizens. The courts need your guidance in deciding these cases involving the most fundamental of rights--the right to have all other rights--United States Citizenship.

There is a division of authority in the several circuits. The Third Circuit's application of Chaunt in United States v. Riela, 337 F.2d 986 (1964) holds material, knowingly false

answers resulting in suppression of facts which, if known, would have warranted denial of citizenship. The Fifth and Seventh Circuits hold material, knowingly false answers resulting in suppression of facts which, if known, would have caused the conducting of an inquiry that might have resulted in denial of a visa. United States v. Fedorenko, 597 F.2d 946 (5th Cir.1976) affirmed on other grounds. United States v. Schellong, App.B. _____F.2d____, (7th Cir. 1983).

Presented here is the vehicle to clarify the meaning of the Chaunt test --the opportunity to take the status of United States Citizenship off tenuous ground.

III.
PETITIONER WAS DENIED A FAIR TRIAL DUE TO SUBSTANTIAL IMPEDIMENTS TO ADEQUATE DISCOVERY AND USE OF VIDEOTAPE DEPOSITIONS AT TRIAL.

Suit filed March 30, 1981 (R1). Petitioner's first Interrogatories were answered on June 22; July 13; October 19, 1981; January 18, February 24, March 15, March 18, May 3 and May 13, 1982 (R5,15, 17,43,63,70,72,86,88). Petitioner's Second Interrogatories were answered February 12, 1982 (R36). Schellong's Third Interrogatories were timely filed (R85) and stricken unanswered at start of trial (T3,4).

Government produced thousands of pages of documents. All but I.N.S. were in German. More than 2,500 pages were never translated (R60,Ex.B). Petitioner had no money (R22,Ex.A.;R20).

At least one critical document was mistranslated to Petitioner's substantial disadvantage by omitting "Waffen" which,

if properly translated, directly corroborated the Petitioner. At least one page of a document was not translated that indicates Petitioner joined the German Army in 1934 (Schellong Ex.5)--again direct corroboration of the defense.

First disclosure of witnesses L. Donald Junior and Judge Petrone was after close of discovery (R118,p.24).

Government named only one expert, Charles W. Sydnor (R36). It denied any others (R56). It presented Dr. Sydnor as an history expert. It surprisingly presented Judge Siracusa, Judge Petrone and L. Donald Junior as I.N.S. experts to answer hypothetical questions. Petitioner objected (T60,72).

Government took videotape depositions in California and Europe (R73,R66,R89,R90, R93,R94). The indigent Petitioner (R22, Ex.A;R20) was unable to pay his attorney fees. His request for a protective order

was denied (R22). He had no opportunity to cross-examine contrary to Goldberg v. Kelly, 397 U.S. 254, 25 L.Ed. 2d 287, 90 S.Ct. 1011.

Government called four live witnesses and presented seven videotaped witnesses against Petitioner.

Six of the videotaped witnesses' testimony was not cross-examined and out of the presence of Petitioner and attorney due to poverty. The majority of the trial was in absentia.

Of the four live witnesses, both Petrone and Junior were surprise witnesses in two ways: (1) Their names were provided after discovery; (2) they acted as "experts," but were never disclosed as such. Siracusa was disclosed in time, but not as an expert. Sydnor was disclosed in time but defense was not given time to obtain the texts he relied upon (R50,R51, R69); the documents he relied upon were not

translated (R51,R69); and the defense was not given sufficient time to depose him R82).

In short, Petitioner had no meaningful discovery--no fair chance to meet the evidence.

23 Am Jur 2d para. 156 states:

> "The various instruments of discovery under the federal rules... now serve as a device to narrow and clarify the basic issues between the parties, and also as a device for ascertaining the facts, or information as to the existence or whereabouts of facts, relative to those issues, and the deposition-discovery procedure simply advances the stage at which the disclosure can be compelled from the time of trial to the period preceding it, thus reducing the possibility of surprise."

Only in the event a strong public policy weights against disclosure, modern instruments of discovery are liberally employed. These procedures make less of a game of blind man's bluff and more a fair contest with the basic issues and

facts disclosed to the fullest practicable extent. United States v. Proctor & Gamble Co., 356 U.S. 677, 2 L.Ed. 2d 1077, 78 S. Ct. 983. The trial is to be a method of arriving at the truth and not "a battle of wits between counsel." Guilford Nat. Bank v. Southern R. Co. (CA4 NC) 297 F.2d 921; Tiedman v. American Pigment Corp. (CA4 Va) 253 F.2d 803; Harper and Rowe Publishers, Inc. v. Decker, 423 F.2d 487 (7th Cir. 1970).

There is not one witness against Petitioner that he had a fair and reasonable opportunity to depose. Eight of the eleven witnesses against him, he had no opportunity to depose. Six of the witnesses against him, he had no opportunity to cross-examine. Petitioner never was provided with thousands of pages of relevant discovery documents in any usable form, a critical document was untranslated.

The Defendant was denied a fair trial--he had no meaningful opportunity to be heard--he was denied due process of law based upon the substantial accumulation of impediments to discovery and cross-examination.

IV.
PETITIONER HAS THE RIGHT TO TRIAL BY JURY IN A DENATURALIZATION CASE UNDER 8 U.S.C. §1451(a).

Introduction

The Government filed suit against Petitioner alleging that he had procured his citizenship illegally and by concealment or willful misrepresentation of a material fact (R1). Petitioner timely answered denying the Government's allegations thereby putting the disputed facts in controversy (R8). Petitioner demanded trial by jury (R8).

On the Court's own motion the Petitioner's jury demand was stricken (R57,59).

The Government orally relied on Luria v.

United States, 231 U.S. 9 (1913) and United States v. Walus, 616 F.2d 283 (7th Cir. 1980). (Transcript of March 10, 1982, pp.4 and 5.) The Government filed neither a motion nor a brief.

I. LURIA AND WALUS DO NOT CONTROL

A. Luria and Walus Considered Only The Seventh Amendment Basis for Trial by Jury.

The Government claims that, in Luria, the Supreme Court held that a Defendant in a denaturalization action has no right to a jury trial. The Government overstates. In Luria, the Court limited its holding to a claim to a jury made solely under the Seventh Amendment. The Supreme Court's entire discussion of the jury-trial issue was:

> "Lastly it is urged that the District Court erred in not according to the defendant a trial by jury. The Claim is predicated upon the Seventh Amendment to the Constitution, which declares that 'in suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall

> be preserved.' This, however, was not a suit at common law. The right asserted and the remedy sought were essentially equitable, not legal, and this, according to the prescribed tests, made it a suit in equity. Parson v. Bedford, 3 Pet. 433, 337; Irvine v. Marshall, 20 How. 558, 565; Root v. Railway Company,105 U.S. 189, 207. In this respect it does not differ from a suit to cancel a patent for public land or letters patent for an invention. See United States v. Stone, 2 Wall.525; United States v. San Jacinto Tin Co., 125 U.S. 273; United States v. Bell Telephone Co., 128 U.S. 315."

(231 U.S. at 27-28) (emphasis added). The Luria opinion never addressed the other Constitutional principles on which Petitioner relies.

The report of Luria's argument in the Supreme Court reveals he claimed a right to jury trial only under the Seventh Amendment. (231 U.S. at 14). Further, Luria's jury-trial discussion may qualify as dictum. Luria, himself, remained in South Africa during his trial. (231 U.S. at 19). All the evidence at Luria's trial was stipulated. (231 U.S. at 17).

Juries, of course, resolve contested issues of fact and witness credibility. A jury at Luria's trial could have served no function.

In its footnote treatment of the jury-trial issue, the Walus Court found itself "bound by" Luria and simply followed it without further analysis. Walus made no independent examination of the limited logic of Luria, nor did it go beyond the Seventh Amendment. The Court's citation to the Seventh Amendment cases Beacon Theatres, Inc. v. Westover, 359 U.S. 500 (1959), and Dairy Queen, Inc. v. Wood, 369 U.S. 469 (1962), confirmed that it grounded its holding solely on Seventh Amendment grounds. United States v. Walus, 616 F.2d at 304 n.53.

B. Luria Does Not Decide the Seventh Amendment Issue Today. The 1913 Patent Analogy Does Not Apply to Citizenship Obtained Under "Solemn Adjudication.

In Luria, the Government sued to cancel

a citizenship certificate obtained in 1894 under naturalization procedures in effect until 1906. The certificate was obtained ex parte as one would obtain a patent. These were "merely colorable letters of citizenship." (231 U.S. at 24).

Schellong's citizenship was acheived by means of a judicial proceeding against the Government. 8 U.S.C. §1447. These rights are precious and conferred by solemn adjuciation. Schneiderman v. United States, 320 U.S. at 125. The patent analogy does not fit present-day citizenship. There is a review of early procedures in Pre-Statutory Denaturalization, 35 Cornell L.Q. 120 (1949).

C. This Court can, and Should, Give Full Consideration to Petitioner's Claim to A Jury Trial.

Controlling standards of interpretation limit Luria to their facts and holdings:

> "...general expressions, in every opinon, are to be taken in connection with the case...principles which may serve to illustrate it are considered in their relation to the case..., but their possible bearing on all other cases is seldom completely investigated."

Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 399-400 (1821).

II. DUE PROCESS OF LAW INSURES PETITIONER A JURY TRIAL

The Supreme Court has held that, where the stakes for the defendant are as high as they are here, due process of law insures a jury. Duncan v. Louisiana, 391 U.S. 145, 156 (1968). Murray's Lessee v. Hoboken Land, 59 U.S. (18 How.) 272(1855).

"Settled usages and modes of proceeding existing in the common and statute law of England" are the constituents of due process. The English government was not allowed to banish a citizen without a jury. W. McKechnie, Magna Carta, 436 (1905). Banishment, exile and transportation were punishments for crimes only proved at a

trial by jury. 4 Blackstone's Comm. 368-70. Mathews v. Eldridge, 424 U.S. 319 (1976) sets out three distinct factors the court should consider in what is required of due process. The division of labor in a jury trial between the judge and the jury is a most meaningful safeguard for an accused. The Government's interest in a marginal reduction of costs by bench trial does not outweigh the Defendant's interest in the additional security which a jury trial affords.

The public interest necessitates that naturalized citizens enjoy the same rights as the native born. Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963).

III. ARTICLE III, §2 AND THE SIXTH AMENDMENT GUARANTEE PETITIONER A TRIAL BY JURY.

The Supreme Court holds that forfeiture of citizenship is penal and has "throughout history been used as a punish-

ment." Kennedy v. Mendoza-Martinez, supra. Denaturalization has consequences which "may be more grave than consequences that flow from conviction for crimes." Klapprott v. United States, 335 U.S. at 611. Article III, §2 and the Sixth Amendment to the Constitution therefore guarantee Schellong a jury.

IV. EQUAL PROTECTION OF THE LAWS GUARANTEES PETITIONER A JURY TRIAL.

Fifth Amendment "due process of Law" also requires the federal government to insure equal protection of the laws. In Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 738 (1824), Chief Justice Marshall declared that naturalized citizens enjoy equal with the native born. If they are to enjoy equal rights with the native born a naturalized citizen must have a right to a trial by jury if his citizenship is to be taken.

V. THE SEVENTH AMENDMENT INSURES PETITIONER A TRIAL BY JURY.

The Seventh Amendment "preserve[s] the right to jury trial as it existed in 1791." Parklane Hosiery Co. v. Shore, 439 U.S. at 333. In 1791, Government could not strip a citizen of his rights and expel him from the country without resort to a jury trial. Mr. Justice Story's opinion was quoted in Curtis v. Loether, 415 U.S. 189 at 193 (1974). The thrust of Seventh Amendment right to jury trial and what "common law" meant is well defined there. Blackstone wrote in 1769 that the jury-trial right under Magna Carta protected the English subject from such things as exile. 4 Blackstone's Comm. 343. No analogue to a 1791 common-law proceeding better fits the Government's pursuit of Petitioner than a prosecution for the common-law crime of perjury. The ele-

ments of the charge in the instant case and the elements of the common-law crime of perjury are virtually identical.

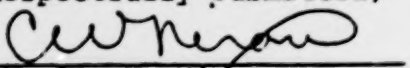
CONCLUSION

The Government has failed to prove the case against Petitioner by clear and convincing evidence. No willfully false statement was proved; nor do the underlying facts, if known, constitute a bar. At most they constitute reason for an investigation. A proper application of the second prong of the Chaunt test will result in reversal.

Further, Petitioner suffered the results of prejudicial error in the trial court's denial of trial by jury, substantial restraints on adequate discovery and the admission into evidence of videotape depositions without

cross-examination and the use of surprise experts by the Government.

Respectfully submitted,



Charles W. Nixon
Attorney for Conrad Schellong
29 S. LaSalle St.
Chicago, IL 60603
(312) 782-7450

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA,	)	
Plaintiff,	)	
-vs-	)	No. 81 C 1478
CONRAD HEINRICH SCHELLONG,	)	
Defendant.	)	

MEMORANDUM OPINION AND AWARD

Plaintiff, the United States of America, brought this action pursuant to Section 340(a) of the Immigration and Nationality Act of 1952, as amended, 8 U.S.C. §1451(a), to revoke the citizenship of the defendant, Conrad Heinrich Schellong, on the grounds that the defendant procured his citizenship illegally and by concealment or

willful misrepresentation of a material fact. The government contends that the defendant, in applying for an immigration visa and later permanent citizenship, willfully concealed or misrepresented his membership in certain Nazi-organizations and his involvement with the concentration camps in Nazi Germany during the 1930's. Beginning on May 26, 1982, this court heard six days of testimony concerning the government's claims and Schellong's defenses. This court has reviewed the transcript of that trial and the relevant exhibits, as well as the parties' post-trial memoranda, and hereby enters the following findings of fact and conclusions of law.

I. Factual Background

Defendant Conrad Schellong was born in Dresden, Germany, in 1910. In the Spring of 1932, as Germany's economy was failing and Hitler was coming into power, the defendant became a member of Germany's Sturmabteilungen, a paramilitary unit of the Nazi Party, more commonly known as the Storm Troopers or "brown shirts." The duties of the storm troopers were generally to guard Nazi meeting halls and to disrupt meetings of opposing political parties. Although the storm troopers are now known to have also participated in numerous

acts of street violence and pogroms against the Jewish people during the late 1930's, the record in this case indicates that Schellong remained a member of the group only until November, 1932, and that his sole activities with the organization consisted of his participation in two demonstrations or marches in support of the Nazi Party.

In December, 1932, the defendant joined both the German Nazi Party (Nationalsozialistische Deutsche Arbeiter Partie) and the Schutzstaffel, an organization more commonly known as the "Allgemeine SS" or simply "SS." For purposes of this litigation, it need be noted only briefly that the Nazi Party espoused a

philosophy of racial purity, racial superiority, and intolerance toward political and philosophical opposition. The principal function of the Allgemeine SS in the early 1930's was to guard Nazi Party speakers and to carry out party intelligence, although the SS gradually assumed the additional responsibility of the administration and guarding of the concentration camps. The SS was, at all relevant times, distinct from the Wehrmacht, or German armed forces, which were composed of Germany's army, air force, and navy. According to the evidence, the defendant remained a member of the Allgemeine SS until 1934, and was a member of the Nazi Party until the fall

of Hitler's Germany in 1945.

Of particular importance to this litigation are the defendant's activities between 1934 and 1939. In February 1934, the defendant joined the SS Sonderkommando "Sachsen" ("SS Special Commando 'Sachsen'"), an organization stationed at the Sachsenburg Concentration Camp in Saxony, Germany.[1] Upon completion of

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[1] According to the testimony, the Sachsenburg Concentration Camp consisted of one large building, which housed both prisoners and guards in separate sections, a guard house, a medical building, work sites, and an assembly area. The camp was surrounded by a river on one side, and steep hills in the rear. During the time that the defendant was stationed at Sachsenburg, the camp held approximately 400-500 prisoners, including political prisoners, Jehovah's Witnesses, Protestant and Catholic clergy, and Jews. It is uncontested

basic training, the men of the SS Special Commando "Sachsen" were considered wach truppe, or "watch troops", distinct from the Abteilung Drei or camp commandant's staff, which was responsible for the daily operation of the camp, prisoners' work schedules, and punishment.

The defendant testified that he began his assignment at Sachsenburg in October 1934 as a corporal, and that his responsibilities included the supervision of a platoon of guards and also service as a Security Officer and a Reserve

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1 cont.
that the prisoners at Sachsenburg were not being held for committing any criminal acts, but rather for the perceived threat which they represented to the success of the Nazi Party.

(or "Alert") Officer on a rotating basis with other platoon leaders. During the defendant's rotation as Security Officer, he was in charge of security for the entire camp for twenty-four hour periods. The SS Special Commando "Sachsen" was renamed the SS Wachverbande "Sachsen" ("SS Guard Unit") in late 1934, and renamed again as the SS Totenkopfverbande "Sachsen" ("SS Death's Head Unit 'Sachsen'") in April 1936. The defendant's duties during that period, however, did not change significantly.

In early 1936, the defendant was assigned for approximately four months to the 11th Company of the SS Guard Unit "Oberayern" at Germany's

Dachau Concentration Camp, near Dachau, Germany, where he participated in a platoon leaders training course. Upon his return to Sachsenburg in late April 1936, the defendant was promoted to the rank of Second Lieutenant, and given command over approximately 30 of the 100 to 120 SS men guarding the camp. The guards under Schellong's supervision served as camp guards approximately every fourth or fifth day, supervising the prisoners at the work sites and performing other guard duties to prevent escapes. Guards were instructed to keep alert and were told to warn and then shoot to kill any prisoner attempting to escape.

Although it appears that the SS guards were not directly responsible for the punishment of the camp prisoners and their onerous work schedules, the guards were nevertheless aware of the prisoners' cruel treatment. Schellong testified that he witnessed at least two floggings of prisoners while at Sachsenburg, and that he personally took turns checking on prisoners being held in solitary confinement at the camp. Furthermore, the guards were aware of the work detail of hard labor assigned to the prisoners, including shoveling sewage, breaking rocks, and hauling stones.

In late November, 1936, Schellong was transferred to

the Dachau Concentration Camp, where he was assigned to the 7th Death's Head Company of the Death's Head Unit "Oberbayern."[2] Between December

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[2]Witnesses testified that the camp at Dachau was much larger than Sachsenburg, accomodating between 4,000 and 14,000 prisoners during the time that Schellong was stationed there. The camp itself contained a protective arrest area, shops, barracks for the local SS administration, SS guard barracks, officers' quarters and an officers' casino. Unlike Sachsenburg, guards and prisoners were not housed in the same building at Dachau. Dachau's prisoners consisted largely of Jehovah's Witnesses, Jews, Protestant and Catholic clergy and other opponents of the Nazi Party.

1936 and December 1939, when Schellong left Dachau, the defendant commanded the Second Platoon of the 7th Death's Head Company, the 11th Death's Head Company, and the 9th Death's Head Company, all of which were rifle companies that performed guard duty at the camp. The defendant's responsibilities at Dachau included training new recruits, preparation of the duty roster of guards, and the supervision of the guards under his command. Similar to the operation at Sachsenburg, Schellong's men performed their guard duties on a rotating basis, manning the watchtower, guarding the

gate, and supervising the forced labor detail. The defendant was promoted twice during his term at Dachau, to First Lieutenant in April 1937, and to Captain in August 1939.

Although there was some testimony that SS guards occasionally participated in the punishment of prisoners at Dachau, and also some testimony that the guards in at least one of Schellong's units were reputed to be among the most abusive guards in the camp, no evidence was presented that Schellong personally beat or physically abused any prisoner at Dachau. Schellong admitted, however, that he was aware of the inhuman treatment of the

prisoners he guarded--the forced labor, the living conditions, and the punishment. In a volunteered understatement, the defendant testified that he knew that Dachau was not a "nice place to be," and that the punishment of prisoners and their living and work conditions were "not a nice subject."

In late 1939, as the German war effort mounted, the prisoners at the Dachau Concentration Camp were temporarily reassigned to other camps so that Dachau could be used for actual military training of the SS Death's Head Units. At that time, the various Death's Head Units were consolidated into a single military organization and became, in effect, a distinct and separate branch

of the German armed forces. The name given to that military organization was Waffen SS, which translated literally meant "armed SS." Prior to 1939, no organization by that name existed. At no time was the Waffen SS considered a part of the German Army.

The record shows that the defendant served with the 6th SS Death's Head Regiment of the Waffen SS in Norway until 1941, when he was transferred to the eastern front for the remainder of the war. Schellong in November 1942 was promoted to Major of his unit in the Waffen SS, and by the end of the war, held the rank of Lieutenant Colonel.

II. The Defendant's Visa and Citizenship Applications.

On December 3, 1956, the defendant filed an "Application for Immigrant Visa and Alien Registration" (Form FS-256a) with the United States Consular Office in Hamburg, Germany. In response to Question 26 on the application, requesting the applicant to state his places of previous residence, the defendant answered:

> "Birth-1911, Dresden, Germany;
> 1911-1934, Leipzig, Germany;
> 1934-1939, German Waffen SS;
> 1939-1945, Waffen SS during the war, . . ."

No mention was made on Schellong's application of his two years of residence at the Sachsenburg Concentration Camp, or of his three years of residence at Dachau.

On January 24, 1957, the defendant was granted a visa to enter the United States. The defendant entered the United States on or about February 23, 1957, as he has resided in this country ever since that time.

On or about January 29, 1962, the defendant filed an "Application to File Petition for Naturalization" (INS Form N-400) to the Immigration and Naturalization Service. The defendant signed the application on April 16, 1962. In response to Question 7 on the application, requesting the applicant to "[l]ist each organization, association, fund, foundation, club or

society in the United States or in any other place that you have been a member of at any time, and the dates of membership in each," the defendant answered:

Christlicher Verein junger Maenner [Church organization]	1920-1927
Leipziger Ballspiel club [Soccer club]	1926-1932
National Sozialistische Arbeiter Partie [Nazi Party]	1932-1945
Allgemeine SS [elite corp.]	1932-1934
Waffen SS [elite corp.]	1934-1945
Member of the Church of St. Luke [No others][3]	1957-Date

No mention was made on Schellong's application of his

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[3]The bracketed materials above were written, not typed, on the defendant's application, and it appears that they may have been written on the form by the Immigration Examiner during his interview with the defendant.

association with the storm troopers in 1932, or with the SS Sonderkommando "Sachsen", or SS Wachverbande "Sachsen", or with the SS Totenkopfverbande "Sachsen", the Death's Head Unit with which he served for over three years. In addition, no mention was made as to the defendant's association with the SS Totenkopfverbande "Oberbayern" (SS Death's Head Unit "Oberayern") while at Dachau.

On or about April 16, 1962, in connection with the processing of the defendant's application to file a petition for naturalization, the naturalization examiner, Frank M. Siracusa, now Judge of the Cook County Circuit Court,

directed the defendant to provide a sworn written statement concerning certain information on his application. Although the request for a statement was not in writing, and Judge Siracusa was unable to recall the precise wording of his question(s) to Schellong, the defendant's response indicates that the question concerned his activities between 1934 and 1939. Schellong wrote:

> "In the years 1927-1933: the economy of Germany went more and more down. The most of the people were out of work. There were only 2 partys which could come on the power: the Communist party and the N.S.D.A.P. I decided with millions of others for the N.S.D.A.P. I do not believe in the supreme blood of the German race.

"The Allgemeine SS were a part organization of the N.S.D.A.P. There member had to march and to protect the speaker by the vote campaign. Because I was strong and healthy they asked me to join and I did. I hath no rang [sic: rank].

"The Waffen SS was a part of the Germany Army. I like to be soldier and I signed in 1934. I became in all the years in peace and wartime Lt. Colonel. I was highest decorated. I fought only in East against Russia. I had never to do any service in an concentration camp and never arrest one man in this matter. I was only soldier.

* * *

On July 17, 1962, the District Court for the Northern District of Illinois, acting on this petition, granted the defendant's Petition for Naturalization and issued to him Certificate of Naturalization No. 8465738.

III. Discussion

Section 212(a) of the Immigration and Nationality Act, 8 U.S.C. §1182(a)(19) provides that any alien who has procured a visa "by fraud, or by willfully misrepresenting a material fact" shall be ineligible to obtain a visa and shall be excluded from admission to the United States. Correspondingly, Section 340(a) of the Act, 8 U.S.C. §1451(a), provides that a certificate of naturalization will be revoked and set aside where it is later found to have been "illegally procured" or "procured by concealment of a material fact or by willful misrepresentation." See, e.g., Fedorenko v. United States, 449 U.S. 490 (1981).

In addition, the Act states that persons who have given false testimony for the purpose of obtaining benefits under the Act lack, as a matter of law, the good moral character required for obtaining citizenship. 8 U.S.C. §1101(f)(6). To sustain its burden of proof, the government must establish the facts justifying revocation by "clear, unequivocal, and convincing evidence." Fedorenko v. United States, 449 U.S. at 505. As the Supreme Court has noted, "[a]ny less exacting standard would be inconsistent with the importance of the right that is at stake in a denaturalization proceeding." Id. at 505-506.

A. Concealment or Misrepresentation.

In this case, the government claims that Schellong's use of the term "Waffen SS" in both his visa application and his application for a naturalization petition covering the period from 1934-1939 was willfully false and that he used that term for the purpose of concealing his involvement with the German concentration camps. Furthermore, the government contends that the defendant's supplemental statements that the Waffen SS was "a part of the German Army," and that he "had never to do any service in any concentration camp," were also

false, and were also willfully made for the purpose of concealing his concentration camp activities. Such misstatements, the government argues, were material. According to the government, had either the consular official who processed the defendant's visa application or the immigration examiner who processed the defendant's application for a naturalization petition known of the true extent of the defendant's involvement in the SS Death's Head Unit, including his involvement with the concentration camps, his visa and citizenship applications would never have been approved. [4]

It is the defendant's position that he did not conceal or misrepresent his activities in the Sachsenburg or Dachau concentration camps, or his membership in the SS Death's Head organization. The defendant maintains that he never really served in a concentration camp, but was only a trainer of guard troops at the camps. The defendant denies that he ever actually

4 (from previous page) The government has also raised several alternative grounds for revocation based on the defendant's participation in acts of persecution and immorality. The court need not address those arguments, however, if it finds that the defendant willfully concealed or misrepresented material facts on either his visa or citizenship application.

served as a camp guard, and adamantly states that he never struck or otherwise injured a prisoner. Concerning his use of the term "Waffen SS" instead of Death's Head Unit as his organizational affiliation from 1934-1939, and his use of "Waffen SS" as his residence during that period instead of the Sachsenburg and Dachau concentration camps where he was actually residing, the defendant testified that although the military organization known as the Waffen SS did not actually come into existence until 1939, long before that time the term was used as an informal designation

for all "armed" SS personnel. Therefore, he claims that his designation of the Waffen SS for both his residence and also as his only organizational affiliation (outside of the Nazi Party), reflected a use of common parlance for the time, and not an intentional misrepresentation or concealment of his Death's Head activities in the camps.

The court, having heard all of the evidence presented and after having had the opportunity to review and assess the credibility of the various witnesses, particularly the testimony of the defendant, the immigration examiner Siracusa, and the government's

expert witness Dr. Charles Sydnor, finds by clear, convincing and unequivocal evidence that the defendant willfully concealed and misrepresented material facts in his visa and citizenship applications which require that his naturalization certificate be revoked.

The evidence presented by the government conclusively established that during the period from approximately 1934-1936, defendant Schellong resided at the Sachsenburg Concentration Camp in Saxony, Germany, and that while he was there, he was a member of the SS Death's Head Unit "Sachsen." The evidence further

established that while he was at Sachsenburg, the defendant's activities included the training of concentration camp guards, and service as the camp Security Officer and as a Reserve Officer on a rotating basis. The record also shows that incident to the defendant's duties as a Death's Head officer at Sachsenburg, the defendant instructed the guards under his supervision to prevent escapes from the camp, and told the guards that if a prisoner were seen escaping, the guard was to warn the prisoner and then shoot to kill him. Furthermore, the court finds that incident to the defendant's duties at

Sachsenburg, the defendant was responsible for checking on a prisoner, Erich Jacoby, who was being held in solitary confinement, and that the defendant personally witnessed two floggings while he was at the camp. Finally, the court finds that the defendant was aware of the regime of hard labor and punishment imposed upon the prisoners at Sachsenburg.

The court also finds, based upon all of the evidence presented at trial, that the defendant was stationed at the Dachau Concentration Camp from approximately November 1936-1939, during which time he served as a member of the SS Death's Head unit at the camp,

commanding the Second Platoon of the 7th Death's Head Company, the 11th Death's Head Company, and the 9th Death's Head Company. With respect to the defendant's service at Dachau, the court finds that although the defendant was not housed in the same building that housed the prisoners as he had been at Sachsenburg, the defendant's activities with respect to the concentration camp were significant. The evidence convincingly established that at Dachau, the defendant supervised guard troops who watched the prisoners on work detail, manned the watchtowers to prevent escapes, and engaged in other guard-type activities. The

evidence also established that the defendant was aware of the forced labor assignments at the camp, ranging from breaking rocks to hauling raw sewage, and that the defendant was also aware of the punishment inflicted upon the prisoners by the members of the commandant's staff and also by some guards.

In sum, the court finds that the defendant misrepresented his residence on his visa application by deleting any mention of his residence at Sachsenburg and Dachau. Furthermore, the court finds that the defendant misrepresented his organizational affiliations on his application for a naturalization petition by deleting any mention of his

affiliation with the SS Sonder-kommando "Sachsen," the SS Wachverbande "Sachsen," or particularly the SS Totenkopfverbande "Sachsen" (or "Death's Head"). Defendant also failed to include his affiliation with the SS Totenkopfverbande "Oberbayern" (SS Death's Head Unit "Oberbayern") while at Dachau. Finally, the court finds that the defendant misrepresented certain information on his supplemental statement in support of his naturalization petition, by stating that the Waffen SS, a term which he had used, was a branch of the German Army and that he had not served in any concentration camp. All of the above misrepresentations, the court finds, alternatively

represent statements which conceal the fact of the defendant's membership in the SS Death's Head and his service supervising guards in the Sachsenburg and Dachau concentration camps.

B. Materiality

The Supreme Court has held that for purposes of interpreting the immigration laws, a misrepresentation "must be considered material if disclosure of the true facts would have made the applicant ineligible for a visa." Fedorenko v. United States, 449 U.S. at 509. A second, more liberal test for determining materiality in naturalization applications not relied upon by the Supreme

Court in Fedorenko was expressed in Chaunt v. United States, 364 U.S. 355 (1960). There, the Court held that the government must show either:

> "(1) that facts were suppressed which, if known, would have warranted denial of citizenship or (2) that their disclosure might have been useful in an investigation possibly leading to the discovery of other facts warranting denial of citizenship."

In this case, the court finds that had Schellong not concealed his correct residence on his visa application in 1956, he would have been considered ineligible to receive an immigration visa by virtue of his service at Sachsenburg and Dachau. Lewis D. Junior, who served in the Consular Office at Hamburg for a three-year period following

early 1956, testified that visa applications were routinely denied whenever they disclosed service in a concentration camp and that defendant would have been rejected if his documentation showed that he had been involved in a SS Death's Head division at a concentration camp. As the Court in Fedorenko, supra, pointed out, "At the very least, a misrepresentation must be considered material if disclosure of the true facts would have made the applicant ineligible for a visa." 449 U.S. at 509.

In addition, the court finds that the defendant's misrepresentations on his application for a petition of naturalization were

material. There, in response to a question requesting all of his organizational affiliations, the defendant failed to list his membership in the SS Death's Head Unit, an answer which would have prompted further investigation "possibly leading to the discovery of other facts warranting denial of citizenship." Chaunt, supra. The materiality of the defendant's concealment on his supplemental statement is also evident. Had the defendant properly stated that the Waffen SS (which he had listed as one of his only organizational affiliations) was never considered a part of the German Army, and that his assignments were

at two German concentration camps, the court is convinced that further investigation would have taken place, possibly leading to the discovery of other facts warranting denial of Schellong's citizenship petition. See Chaunt. The effect of these misstatements and missions was highlighted when the following hypothetical question was asked of the defendant's immigration examiner:

MS. WAWZENSKI: If the misrepresentation had to do with failing to disclose the service at these camps, and that he rose to the level of a captain in those camps, that he supervised guards who dealt with forced labor, ordered those guards to shoot to kill anyone who escaped from the camp. If that

was the misrepresentation that had been made, what would be your conclusion?

. . . .

THE WITNESS: My conclusion would be to deny the application.

Although the court is not bound to accept the witness' testimony as conclusive, based upon all of the unrebutted testimony concerning the extent of the defendant's involvement in camp activities, the court concludes that the defendant's misrepresentations and omissions were material and if true and complete answers had been given, defendant would not have received his citizenship.

C. Intent

The parties have agreed that only willful misrepresentations or willful concealment of material facts is actionable under the immigration laws at issue here. See 8 U.S.C. §1451(a). In this case, the court finds that the misrepresentations and concealment were willful. It is significant that from the time defendant applied for his visa in 1956 until he filed his supplemental affidavit on July 17, 1962, in support of his petition for naturalization, he carefully avoided any references to his residence and his activities at

Sachsenburg and Dachau. His excuse for omitting this damaging information is that he used the term Waffen SS to cover his army service during this period.

Although the defendant in his own behalf concerning the common use of the term Waffen SS as an umbrella term for all armed SS personnel, he failed to introduce any evidence of consequence supporting such a finding. The only evidence offered by the defendant was an officer's evaluation of Schellong prepared in 1940. In that evaluation, the officer listed Schellong as having been with the Waffen SS since 1934. That

limited evidence, however, is not seriously probative of any recognized informal acceptance of the term prior to 1940, particularly in light of Dr. Sydnor's testimony that the term was not used. In addition, the government introduced a curriculum vitae prepared by the defendant himself in 1936, in which he lists his organizational affiliations by individual name, rather than collectively as Waffen SS. In fact, Schellong's curriculum vitae makes no mention of the term Waffen SS. Finally, as evidence of willfulness, the court notes that when the defendant was given an opportunity in 1962 to clarify just what he meant by the term Waffen SS, he

erroneously stated that it was a part of the German Army, thus drawing attention away from his connection with the concentration camps. Given the widely recognized consequences to an immigrant who had been linked to the concentration camps, on the basis of the testimony presented, defendant had ample reasons to hide his guard service during this period. The court concludes that the government has proven by clear and convincing evidence that the defendant's misrepresentations were willful.

IV. Equitable Defenses.

The defendant has raised a number of equitable defenses,

claiming that the representations which he made on this application, including his admitted affiliation with the Nazi Party, should have been sufficient to alert the government to his SS activities as early as 1956 or 1962, and that the government's failure to act on that information until this late date constitutes laches or estoppel, with the same effect as a statute of limitations.

A similar plea was listened to sympathetically by the district judge involved in the appeal in Fedorenko v. United States, 449 U.S. at 516-18. In that case, the district court had ruled that even assuming that petitioner had misrepresented

material facts, equitable and mitigating circumstances required that the petitioner be permitted to retain his citizenship. In agreeing with the court of appeals that the trial court possessed no such discretion, Mr. Justice Marshall, writing for the Supreme Court, left no question as to the limited authority of a district judge in denaturalization proceedings:

> "[O]nce a district court determines that the Government has met its burden of proving that a naturalized citizen obtained his citizenship illegally or by willful misrepresentation, it has no discretion to excuse the conduct. Indeed, contrary to the District Court's suggestion, . . . this issue had been settled by prior decisions of this Court. [5] In case after

> case, we have rejected lower court efforts to moderate or otherwise avoid the statutory mandate of Congress in denaturalization proceedings. . . . We repeat here what we said in one of these earlier cases.
>
> 'An alien who seeks political rights as a member of this Nation can rightfully obtain them only upon the terms and conditions specified by Congress. Courts are without authority to sanction changes or modifications; their duty is rigidly to enforce the legislative will in respect of a matter so vital to the public welfare. United States v. Ginsberg, [243 U.S. 472, at 474-475 (1917).]'"

Fedorenko, supra, at 517-518

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5 For other cases to the same effect as Fedorenko, see also Costello v. United States, 365 U.S. 265, at 281 (1961); Knauer v. United States, 328 U.S. 654 (1946); and United States v. Ness, 245 U.S. 319 (1917).

(footnote added.)

At the least, Conrad Schellong in applying for his visa and his admission to citizenship was under both a moral and a legal obligation to give truthful and complete answers to the questions posed to him. He failed in this test and thereby obtained a grant of citizenship which would otherwise have been denied him. Having taken this course and having willfully made the material misrepresentations and omissions discussed in this opinion, Schellong himself is responsible for the order which follows:

It is the judgment of this court that this court's order of July 17, 1962, admitting defendant to citizenship, is

hereby set aside, and it is further ordered that defendant's Certificate of Naturalization No. 8465738 is hereby cancelled, and that said certificate be surrendered to the United States Attorney for the Northern District of Illinois.

ENTER

/ss/ Bernard M. Decker
United States
District Judge

DATED: September 9, 1982

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 82-2948

UNITED STATES
OF AMERICA

Plaintiff-
Appellee,

v.

CONRAD HEINRICH
SCHELLONG,

Defendant-
Appellant.

APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE NORTHERN
DISTRICT OF ILLINOIS, EASTERN
DIVISION
NO. 81 C 1478-BERNARD M. DECKER,
JUDGE

ARGUED MAY 11, 1983-
DECIDED AUGUST 24, 1983*

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*This appeal was originally decided by unreported order on August 24, 1983. See Circuit Rule 35. The Court has subsequently decided to issue the decision as an opinion.

Before CUMMINGS, Chief Judge, ESCHBACH, Circuit Judge, and CAMPBELL, Senior District Judge.**

CUMMINGS, Chief Judge. Defendant Conrad H. Schellong appeals from a district court order setting aside a prior order admitting defendant to citizenship, and cancelling defendant's Certificate of Naturalization. United States v. Schellong, 547 F. Supp. 569 (1982).

Plaintiff, the United States of America, brought this action pursuant to Section 340(a) of the Immigration and Nationality Act of 1952, as amended,

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** The Honorable William J. Campbell, Senior District Judge for the Northern District of Illinois, is sitting by designation.

8 U.S.C. §1451(a), to revoke the citizenship of the defendant on the grounds that he procured his citizenship illegally and by concealment or willful misrepresentation of a material fact.

The controversy centers around Schellong's activities between 1932 and 1939 as he described them in 1956 on his visa application, in 1962 on his petition for naturalization, and in a supplemental statement filed in connection with that petition. The evidence in the record shows that in 1932 defendant joined the para-military unit of the Nazi Party, the Sturmabteilungen, more commonly known as the

storm troopers, "brown shirts" or "SA". He remained a member of the SA for several months. In December of 1932 defendant joined both the Nazi Party and the Schutzstaffel, commonly known as the Allgemeine SS, and he remained a member of the Allgemeine SS until 1934. As the district court found, "[t]he principal function of the Allgemeine SS in the early 1930's was to guard Nazi Party speakers and to carry out party intelligence, although the SS gradually assumed the additional responsibility of the administration and guarding of the concentration camps." 547 F. Supp. at 570. In February 1934, defendant joined

the SS Sonderkommando "Sachsen" (SS Special Commando "Sachsen") which was stationed at the Sachsenburg Concentration Camp in Saxony, Germany. The SS Special Commando "Sachsen" was renamed the SS Wachverbande "Sachsen" (SS Guard Unit "Sachsen") in late 1934, and in April 1936 was again renamed the SS Totenkopfverbande "Sachsen" (SS Death's Head Unit "Sachsen").

In early 1936, defendant was assigned for approximately four months to the 11th Company of the SS Guard Unit "Oberbayern" at Dachau Concentration Camp, near Dachau, Germany, where he participated in a platoon leaders training course. He

returned to Sachsenburg for several months, and was then transferred to Dachau and assigned to the 7th Company of the Death's Head Unit "Oberbayern". Defendant remained at Dachau until December 1939, commanding the Second Platoon of the 7th Death's Head Company, the 11th Death's Head Company, and the 9th Death's Head Company, all of which were rifle companies. In late 1939 as the German war effort mounted, the SS Death's Head Units were consolidated into a single military organization called the Waffen SS ("armed" SS). This organization was never considered a part

of the German armed forces, the Wehrmacht. During this time, defendant rose from a corporal at Sachsenburg in October 1934 to a Captain at Dachau in August, 1939. By the end of the war, he held the rank of Lieutenant Colonel.

While at Sachsenburg, defendant's responsibilities included training and supervising a platoon of guards, and service as a Security Officer and a Reserve Officer on a rotating basis with other platoon leaders. During defendant's rotation as Security Officer, he was in charge of security for the entire camp for twenty-four hour periods. Incident

to defendant's duties, he instructed the guards under his supervision to prevent escapes from the camp, to warn escaping prisoners and then shoot to kill. Defendant also had responsibility on at least one occasion for checking on a prisoner, Erich Jacoby, who was being held in solitary confinement.

The district court found that "at Dachau, the defendant supervised guard troops who watched the prisoners on work detail, manned the watchtowers to prevent escapes, and engaged in other guard-type activities." 547 F. Supp. at 574. Defendant contests this finding, arguing that at Dachau he was in charge

of a platoon of military recruits who did not have to do guard duty. There is substantial evidence in the record, however, to support the finding that the recruits were trained for both military and guard duty, and kept on reserve in case they were needed to do guard duty or maintain order in the camp.

The district court's opinion contains a succinct summary of defendant's visa and citizenship applications, 547 F. Supp. at 572-573 (footnote omitted):

> On December 3, 1956, the defendant filed an "Application for Immigrant Visa and Alien Registration" (Form FS-256a) with

the United States Consular Office in Hamburg, Germany. In response to Question 26 on the application, requesting the applicant to state his places of previous residence, the defendant answered:

> Birth-1911, Dresden, Germany; 1911-1934, Leipzig, Germany; 1934-1939, German Waffen SS; 1939-1945, Waffen SS during the war, . . ."

No mention was made on Schellong's application of his two years of residence at the Sachsenburg Concentration Camp, or of his three years of residence at Dachau.

On January 24, 1957, the defendant was granted a visa

to enter the United States. The defendant entered the United States on or about February 23, 1957, and he has resided in this country ever since that time.

On or about January 29, 1962, the defendant filed an "Application to File Petition for Naturalization" (INS Form N-400) to the Immigration and Naturalization Service. The defendant signed the application on April 16, 1962. In response to Question 7 on the application, requesting the applicant to "[l]ist each organization, association, fund, foundation, club or society in the United States or in any

other place that you have been a member of at any time, and the dates of membership in each," the defendant answered:

Christlicher Verein junger Maenner [Church organization]	1920-1927
Leipziger Ballspiel club [Soccer club]	1926-1932
National Sozialistische Arbeiter Partie [Nazi Party]	1932-1945
Allgemeine SS [elite corps]	1932-1934
Waffen SS [elite corps]	1934-1945
Member of the Church of St. Luke [No others]	1957-Date

[The five items in brackets may have been written on the form by the immigration examiner.] No mention was made on Schellong's application of his association with the storm troopers in 1932, or with the SS Sonderkommando

"Sachsen" the SS Wachverbande "Sachsen" or with the SS Totenkopfverbande "Sachsen", ...In addition, no mention was made as to the defendant's association with the SS Totenkopfverbande "Oberbayern" (SS Death's Head Unit "Oberbayern") while at Dachau.

On or about April 16, 1962, in connection with the processing of the defendant's application to file a petition for naturalization, the naturalization examiner, Frank M. Siracusa, now Judge of the Cook County Ciruit Court, directed the defendant to provide a sworn written statement concerning certain in-

formation on his application. Although the request for a statement was not in writing, and Judge Siracusa was unable to recall the precise wording of his question(s) to Schellong, the defendant's response indicates that the question concerned his activities between 1934 and 1939. Schellong wrote:

> "In the years 1927-1933: the economy of Germany went more and more down. The most of the people were out of work. There were only 2 partys which could come on the power: the Communist party and the N.S.D.A.P. I decided with millions of others for the N.S.D.A.P. I do not believe in the supreme blood of the German race.
>
> "The Allgemeine SS were a part organization of the N.S.D.A.P. There member had to march

and to protect the speaker by the vote campaign. Because I was strong and healthy they asked me to join and I did. I hath no rang [sic: rank].

"The Waffen SS was a part of the German Army. I like to be soldier and I signed in 1934. I became in all the years in peace and wartime Lt. Colonel. I was highest decorated. I fought only in East against Russia. I had never to do any service in an concentration camp and never arrest one man in this matter. I was soldier.

* * * *

On July 17, 1962, the District Court for the Northern District of Illinois, acting on this petition, granted the defendant's Petition for Naturalization and issued to him Certificate of Naturalization No. 8465738.

I. Insufficiency of the evidence

Defendant argues that the government has failed to show willful misrepresentation or concealment on the visa application, the petition for naturalization, or the supplemental statement by clear, unequivocal and convincing evidence. Fedorenko v. United States, 449 U.S. 490, 505; Chaunt v. United States, 364 U.S. 350, 353. On the visa application, when asked to list residences defendant listed "German Waffen SS" from 1934-1939, and "Waffen SS" from 1939-1945. Defendant failed to list Sachsenburg or Dachau as residences even though he

lived at those locations for a total of five years. The government's expert, Dr. Sydnor, testified that the Waffen SS did not exist before 1939, and that consequently, listing "German Waffen SS" as a residence from 1934-1939 was not only not responsive to the question, but was also an impossibility. Defendant responds by claiming that the use of the term "Waffen SS" to mean "armed" SS was common before 1939, even though the Waffen SS was not formally designated as such until 1939. Defendant supports this theory with testimony from his wife, and by introducing an evaluation of Schellong written in 1940 and

referring to defendant as joining the Waffen SS in 1934. The district court gave little weight to this evidence.

If this case centered only around the visa application, we would be reluctant to uphold a finding of willful concealment or misrepresentation. The testimony of government witness L. Donald Junior, a former consular official, indicates that the visa application itself was very limited in space; the applicant's answers would be expanded on the supplemental questionnaire which was also required and in the face-to-face interview. Yet no

supplemental questionnaire was introduced into evidence in this case, and this Court can only hypothesize as to whether or not Schellong was asked about his Waffen SS service, as the government claims he must have been, and whether or not he clarified or expanded his answer. For all we know at this point, Schellong might have entered "Waffen SS" as a form of shorthand for his residences, fully intending to clarify the answer if given the opportunity to do so.

The visa application is not, however, the only alleged instance of willful misrepresentation or concealment. Six years later defendant was asked

on the naturalization petition to list all the organizations and clubs to which he belonged. He failed to list his SA membership in 1932, claiming a lapse of memory, though he did remember to list his church membership from 1920-1927, and his membership in a soccer club from 1926-1932. He again listed Waffen SS, but this time from 1934-1945 rather than dividing it up as in his visa application, into "German Waffen SS" from 1934-1939, and "Waffen SS" from 1939-1945. Defendant omitted his association with the SS Sonderkommando "Sachsen" the SS Wachverbande "Sachsen", the SS Totenkopfverbande "Sachsen" and the SS

Totenkopfverbande "Oberbayern". There are apparently no space limitations on the naturalization petition that could justify using "Waffen SS" as a shorthand notation. In addition, even if the term "Waffen SS" were used informally during that period-a finding the district court specifically rejected-the evidence shows that on a 1936 curriculum vitae prepared by defendant himself, he listed his organizational affiliations by individual name rather than collectively as Waffen SS. Finally, we know that defendant was given the opportunity to clarify or expand his answer in 1962 because the naturalization examiner asked

him to provide a supplemental statement. Rather than clarifying the use of the term "Waffen SS", defendant erroneously stated that it was part of the German Army, "thus drawing attention away from his connection with the concentration camps." 547 F. Supp. at 576.

Defendant's further remark on the supplemental statement- "I had never to do any service in an concentration camp"- is by far the most damning. The evidence showed that he was a trainer and supervisor of concentration camp guards. Defendant argues that he never participated in supervising or punishing the camp prisoners;

that he was not part of the camp commandant's staff, which was responsible for the daily routine of the prisoners' lives, but was only part of the external guard; that in fact he never "entered" a concentration camp. The government agrees there is no evidence that defendant himself punished any prisoners, though he did check on a prisoner held in solitary confinement at Sachsenburg at least once. The government also agrees that defendant was not part of the commandant's staff, and that he was responsible for prisoners only in that he was to prevent their escape, both from the camp and from outside work sites to which they were

escorted. But defendant is playing a semantics game in arguing that he never served "in" a concentration camp but merely served "at" Sachsenburg and Dachau. Clearly, the district court did not believe that Schellong was capable of making such a fine distinction in 1962. Even if such a distinction were plausible, it would be exceedingly difficult to make in the case of Sachsenburg, which was a fenceless camp, consisting of one large building housing both prisoners and guards in separate sections. In light of these facts, the district court did not err in finding willful misrepresentation or concealment.

Defendant also challenges the sufficiency of the evidence on the issue of materiality by challenging the hypothetical questions asked of the government witnesses. Frank Siracusa, the naturalization examiner who reviewed defendant's petition and presently Judge of the Circuit Court of Cook County, Illinois, was asked whether he would have granted it based on the following facts: defendant failed to mention he had served as a guard at Sachsenburg and Dachau; defendant was assigned regularly on a rotating basis as concentration camp Security Officer; he supervised SS guards, posted guards, checked guard posts, ordered

guards to shoot to kill escaping prisoners; and at Sachsenburg he commanded a platoon of guards who performed regular services at the camp, accompanying prisoners to their work sites and overseeing them during their daily routine (Tr. 41-42). Judge Siracusa responded that he would have denied the petition based on those facts (Tr. 43). Anthony Petrone, the supervisory naturalization examiner on Mr. Schellong's petition, was asked a similar question and gave a similar answer (Tr. 63-65). Immigration Judge Petrone was also asked what he would have done if he

learned that an applicant had participated in the Nazi program of religious and political persecution during the war, and he responded that he would have continued the case pending further investigation (Tr. 66-67). Finally, Mr. Junior, a vice consul with the State Department in Hamburg, Germany in 1956[1], was asked a question similar to that asked of Judge Siracusa, but embellished with some additional facts: the applicant voluntarily joined the SS Death's Head division; prisoners were subjected to beatings by SS

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1 Defendant filed his visa application in 1956 in Hamburg but before a different consular officer.

guards, whippings and solitary confinement; and the applicant had trained voluntary recruits in the ideology of the Nazi regime (Tr. 92-93). The witness responded that he would have denied the visa (Tr. 94).

Some aspects of the hypothetical questions were clearly improper. For example, Mr. Junior was asked what he would have done if he had known that the guards under the applicant's supervision beat prisoners, whipped them and put them in solitary confinement. There was no evidence in the record that defendant's guards had control over punishment such as solitary confinement. In

addition, a question directed to Judge Siracusa implied that defendant's duties as Security Officer were performed both at Dachau and Sachsenburg, while the evidence indicates that he served on a rotating basis as camp Security Officer only at Sachsenburg. Nonetheless, the district judge made clear that defense counsel was to call to his attention at the end of the trial the failure of the government to introduce into evidence facts necessary to sustain the hypotheticals (Tr. 94). The district judge himself was aware of the limitations of the government's evidence, for when the govern-

ment argued in closing that the defendant "participated" in the Nazi program of persecution, the judge noted that there was no evidence implicating defendant in any specific incident (Tr. 532-533). But there were sufficient facts introduced into evidence to show that if the visa examiner or the naturalization examiners had been aware of defendant's role at Sachsenburg as a trainer and supervisor of guards, and as a rotating Security Officer and Officer on Reserve; and of his role at Dachau as a trainer of troops held on reserve for guard duty; and as a member of the SS Death's Head Units, they would

have either denied his visa application and naturalization petition (Tr. 43, 65, 94), Fedorenko v. United States, 449 U.S. at 514-516, or continued then pending a more detailed investigation (Tr. 67), "possibly leading to the discovery of other facts warranting denial of citizenship." Chaunt v. United States, 364 U.S. 350, 355; United States v. Fedorenko, 597 F. 2d 946, 951 (5th Cir. 1979), affirmed without affirming or denying this particular aspect of materiality, 449 U.S. at 518 n. 40.

II. Discovery

The government took several videotaped depositions in

California and Europe. Defendant's counsel did not attend them, and consequently had no opportunity to cross-examine those witnesses whose deposition testimony was introduced at trial. Although the government offered to pay all travel expenses plus a per diem for food and lodging, defendant's retained counsel demanded attorney's fees, relying on Local Rule 4 of the Northern District of Illinois, which provides that the court may, in its discretion, condition a discovery order on payment of reasonable attorney's fees. Counsel argued that he was entitled to fees because he had "more pressing obligations"

in Chicago, and if he stayed in Chicago instead of attending the depositions he could make $600 during one week (Tr. No. 12, 1981 at 16). In addition, counsel claimed his client was indigent despite a $4,000 retainer and a fee agreement for $90 an hour. As pointed out by the government before the district court, defendant's income statement showed interest income without revealing the underlying assets and was thus incomplete. Defendant never requested appointed counsel. In light of these facts, we do not think the district court abused its discretion in denying fees in this case. See also Cassata

v. Federal Savings and Loan Insur. Corp, 445 F. 2d 122, 126 (7th Cir. 1971), interpreting North Atlantic & Gulf S.S. Co. v. United States, 209 F. 2d 487 (2d Cir. 1954), relied on by defendant, as allowing attorney's fees in connection with a deposition to be assessed against the United States based on the fact that the United States agreed to the condition. Despite the fact that defendant chose not to attend the depositions, the district court granted him leave to object during the replay of the videotapes. It should be noted that the district court did not rely on the depositions to any great

extent in its fact-finding.

Defendant raises numerous other objections, all of which are meritless. He argues that government witnesses Immigration Judge Petrone and L. Donald Junior were presented as experts but were named only after the close of discovery. The government's only expert, however, was Dr. Sydnor, and defendant fails to mention that none of his interrogatories ever sought the names of the government's trial witnesses. Both Judge Petrone and Mr. Junior were listed on the pretrial order, and defendant did not object to either of them before trial (Tr. 60, 72).

Defendant also complains about having insufficient time to depose the government's expert, Dr. Sydnor, and insufficient time and money to translate all the government's documents. Defendant thus moved to extend discovery to the year 1999 A.D. Needless to say, the motion was denied. The government provided translations for most of the documents handed over in discovery and gave defendant ample time to depose its expert. The district court did not abuse its discretion in closing discovery.

III. Jury Trial

Defendant argues that he is entitled to a trial by jury. This Court declined to reconsider that issue in United States v. Walus, 616 F. 2d 283, 304 n.53 (7th Cir. 1980), and we decline to do so now. We remain bound by the Supreme Court's holding in Luria v. United States, 231 U.S. 9, that there is no right to a jury trial in a denaturalization proceeding.

Defendant argues that there are alternative constitutional bases for a jury trial, and that Luria only decided the Seventh Amendment issue. He argues that Article III and

the Sixth Amendment provide defendant with the basis for a jury trial in a denaturalization proceeding. But a denaturalization suit has never been considered to be a criminal prosecution; Kennedy v. Mendoza-Martinez, 372 U.S. 144, does not mandate a contrary result. In that case, the Court considered a statute which provided for automatic forfeiting of citizenship as a penalty for leaving the United States to avoid the draft. Because the loss of citizenship was intended as a penal sanction, the accused was entitled to a criminal trial with all its incidents including trial by

jury. A denaturalization proceeding such as this does not entitle a defendant to all the incidents of a criminal trial. Rather, it is well established that such a proceeding is civil in nature. Schneiderman v. United States, 320 U.S. 118, 160; United States v. Minerich, 250 F. 2d 721, 726 (7th Cir. 1957). The fact that loss of citizenship in Mendoza-Martinez, supra, was intended as a penal sanction explains why the defendant in that case, a native-born American, was entitled to a jury trial; defendant's equal protection argument, based on the difference in treatment between

a native-born American and a naturalized citizen, is therefore without merit. So too is defendant's final argument, that the due process clause requires a jury trial in this case. Mathews v. Eldridge, 424 U.S. 319. Though revocation of citizenship is a severe sanction, due process was satisfied by a fair trial before an impartial decision-maker.

The judgment of the district court is affirmed.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

UNITED STATES COURT OF APPEALS
For the Seventh Court
Chicago, Illinois 60604

September 22, 1983

Before

Hon. WALTER J. CUMMINGS,
Chief Judge

Hon. JESSE E. ESCHBACH,
Circuit Judge

Hon. WILLIAM J. CAMPBELL,
Senior District Judge*

UNITED STATES OF AMERICA, Plaintiff-Appellee,	) Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 82-2948 vs.	) No. 81 C 1478
CONRAD HEINRICH SCHELLONG, Defendant-Appellant.	) Bernard M. Decker, Judge

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* The Honorable William J. Campbell, Senior District Judge of the Northern District of Illinois is sitting by designation.

O R D E R

On consideration of the petition for rehearing and suggestion for rehearing en banc filed in the above-entitled cause by defendant-appellant Conrad Heinrich Schellong, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.